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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 275

NEWS SYNDICATE CO., INC.,

Petitioner,

vs.

JANYCE MATTOX,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The respondent and the petitioner will be referred to herein as plaintiff and defendant respectively.

Statement of Facts

The plaintiff, a single woman who was thirty-eight years old resided in the City of Norfolk, Virginia, on the 11th day of August, 1946, when the defendant published in its newspaper that she "had once been a patient in a mental institution." This newspaper had a circulation in the Norfolk area of 32,550 as compared to the local Norfolk newspaper (The Virginian Pilot) which had a circulation of 66,478, and the said newspaper also has the largest circulation of any newspaper in the world (R. 54, 72).

To this libel the defendant admitted in its answer that the published words were false and that it had subsequently apologized after the institution of action for damages. The defendant further answered that the publication was obtained at a judicial hearing (R. 7-8, 13). The plaintiff, necessarily was compelled to take depositions of witnesses in Norfolk, as to the effect the libel had upon her character and reputation, her mental anguish, the circulation of the article, and as to whether or not she was an object of ridicule, scorn, and shame among her neighbors, friends and reputable fellow citizens.

The plaintiff assisted her father in the management of a mercantile store, and her witnesses were substantial residents of the community; Mr. Wallace R. Parker, Sales Manager of a large baking company, who had known Miss Mattox for thirty years (R. 21); Sergeant William Edward Sykes of the Norfolk Police Department, who had known her for fifteen years (R. 42); Mr. Page Herbert, one of the owners of a wholesale grocery known as C. E. Herbert & Son (R. 43); Mr. Ernest L. Johnson, connected with the Texas Oil Company as foreman, who had known her for fifteen or twenty years (R. 58); Mrs. Essie V. Lesner, a housewife who had known the plaintiff for nearly twenty years (R. 73); and Mrs. Stella Lee Hope, who is a housewife and a neighbor of the plaintiff, and had known her for eight or nine years (R. 88). In addition to the foregoing witnesses who testified as to the effect of the libel, the father of the plaintiff testified as well as the plaintiff herself.

The defendant introduced two witnesses; one a Mr. Charles V. Cate, a free lance writer, who stated that he had prepared the material and that the article was written by someone else (R. 250), and that he only spent approximately two days in getting this material up, and for the source of his information as to how he learned that the plaintiff was in a mental institution, stated, "To the best of my recollection,

it came from a conversation I had with Mr. Nowitzky, the coroner's investigator" (R. 252) about eight years after the proceedings in court. The article however, stated that it was written by Ruth Reynolds (Exhibit 1). Ruth Reynolds, however, was not called as a witness. The only other witness produced by the defendant was Leon Nowitzky, who stated that he did not know the plaintiff personally, but only by sight (R. 257), and further stated that he did not know just what he could have said to Mr. Cates about the plaintiff having been a patient in a mental institution (R. 263).

Throughout the case, the defendant sought to show that Janyce Mattox had made a false affidavit on the 5th day of July, 1938 (R. 23-25, 33, 34, 47, 63, 140-142, 215-228, 308-309). It will be noted that this affidavit could have been made, and would have been made by anyone acting in good faith. It will be noted that the publication in the "Sunday News" was over eight years and one month subsequent to the making of the affidavit. As to the affidavit, the Corporation Court held that it was not after discovered evidence, but "merely cumulative" (R. 310).

Thus, it will be seen that the facts are the publication of the libel, the admission of its falsity, with no evidence of a "fair and true report of public, official and judicial proceedings" (Item VIII, Amended Answer, R. 8), and the consequent damage to plaintiff.

Argument

It will thus be noted that the plaintiff, a resident of Virginia, was libeled by a newspaper published by the defendant in New York and circulated in Virginia, and that the damages to her were incurred in Virginia. The petitioner contends that the libel law of New York applies in this case, and that the Single Publication rule is applicable

for this action, and that the court erred in its analysis of the Virginia law. These three items constitute the questions presented.

As to the Application of the Proper Law

The New York courts hold and accept that the law of the state where the wrongful conduct occurred is a measure of liability for torts and accept the doctrine that *lex loci delicti* is the standard. *Schwertfeger* v. *Scandinavian American Line,* 186 App. Div. 89, aff'd 226 N. Y. 696; *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99; *Riley* v. *Pierce Oil Corp.,* 245 N. Y. 152; *Fitzpatrick* v. *International R. R. Co.,* 252 N. Y. 127; *Salimoff & Co.* v. *Standard Oil Co.,* 262 N. Y. 220; *Metcalf* v. *Reynolds,* 267 N. Y. 52; *Voshefsky* v. *Hillside Coal & Iron Co.,* 21 App. Div. 168; *Ritchey* v. *Crudelle,* 255 App. Div. 886; *Restatement of Conflict of Laws,* 377, Note 5.

All of the evidence in this case is without contradiction that the plaintiff suffered all of her damages in the State of Virginia.

The plaintiff submits that the doctrine set forth in *Erie Railroad* v. *Tompkins* (1938), 304 U. S. 64, and later in *Klaxon Company* v. *Stentor Electric Manufacturing Company* (1941), 313 U. S. 487, is controlling. These cases state that a Federal Court, in deciding a case, will apply the substantive law of the state in which they sit and apply their own rules of conflicts of laws. This means that in applying the substantive law of New York in the case at bar, the court must, as a part thereof, apply the conflicts of laws rules of that state.

The defendant, by admission, states that New York follows the general rules with regard to the application of law in cases of tort. The decisions of New York courts, holding that the *lex loci delicti* will control, are too numerous to mention, but the defendant alleges that the "single publication" rule changes all of this with regard to acts for libel,

and in its petition states that the law of Virginia, in which state the impact of the injury was sustained cannot apply.

This is not what the "single publication" rule was designed to accomplish. If such a result was reached by this law, it would, in our opinion, be legislating persons who are injured by the whim and caprice of powerful newspapers who see fit to publish first and take their chances later, out of their legal rights. This would be a violation of their constitutional rights. But this is not, as the decisions will bear us out, the result that this law was designed to reach. The Single Publication rule was not a matter of conflict of laws and therefore not applicable.

Single Publication Rule

In No. 1 A. L. R. 2nd, 384 in the annotation of the case of *Hartman* v. *Time, Incorporated,* 166 Federal 2nd, 127, the "single publication" rule is designed as follows:

> "The rule of law whereby the printing, binding and distribution of a newspaper or magazine of large circulation is regarded as constituting but one publication for the purpose of the law of libel."

There is no mention of conflicts of law in this doctrine. It serves merely as a protective measure against multiple and vexatious suits. This, to our minds, means that if our client was known, in three or four states, that she must choose that state in bringing her action, in which she was most severely injured. But we submit that after her choice, the law of that state where the greatest extent of her injury took place will be the law that the court will apply even under the "single publication" rule.

In the recent case of *Hartman* v. *Time, Incorporated* (1948), cited *supra,* the Federal Court was confronted with the exact situation that we have here. Pennsylvania has adopted the "single publication" rule and the case came

up in the Third Circuit under diversity of citizenship, and the court made this following statement:

> "What is the Pennsylvania conflicts of law rule when publication takes place both within and without the state? We believe that the courts of Pennsylvania follow the Single Publication Rule as a matter of tort law. This does not mean however that the courts of Pennsylvania will not refer the respective foreign publications to the appropriate foreign laws. The contrary is true, because a cause of action is created where the tort takes place."

The defendant has cited the case of *Campbell-Johnston* v. *Liberty Magazine, Inc.*, 64 N. Y. S. 2nd, 659, as authority for its proposition that the proper law to apply is the New York law. However, the defendant has neglected to mention that this case, along with others that it has cited, have reference to the time or limitation in which a libel action may be brought. There is no more fundamental principle in the law than that the *lex fori* always governs the time in which an action may be brought.

In the above named case, the plaintiff was not allowed to recover because the statute of limitations had run and the statute of limitations which was applied was the New York statute which is proper. There is no such situation in our case.

It has been difficult for us to write an answer to this petition because in many cases we find it almost compulsory to cite cases which the defendant has cited for its own authority. For example, the defendant relies heavily on the case of *Gregoire* v. *G. P. Putnam's Sons*, 298 New York 119. This case deals with republication as do most of the "single publication" cases, and seems wholly irrelevant to the case at bar.

The authoritative exposition of this rule is to be found in *Gregoire* v. *G. P. Putnam's Sons, supra.* At page 123 the

opinion recognizes the common law rule that each delivery to a third person of a defamatory article constituted a new publication which gave rise to a new cause of action, notes that the rule had its origin in an era antedating the modern process of mass publication and nation-wide circulation, and proceeds:

> "That rule also gave scant heed to the public policy which underlies statutes of limitation, long regarded as 'statutes of repose' designed to outlaw stale claims. * * * within recent years courts of this State and other jurisdictions have ruled that the publication of a defamatory statement in a single issue of a newspaper * * * is, in legal effect, one publication which gives rise to one cause of action and that the applicable Statute of Limitations runs from the date of that publication."

The question for decision was whether the plaintiff's action, which was based on libelous matter in a book published by the defendant, was barred by the New York statute of limitations. A copy of the book was sold in New York within the statutory period but the initial publication of the book long antedated such period. The precise decision was that the statute began to run from the date of the initial publication. Other cases cited in that opinion at p. 123 have likewise applied the "single publication" concept in conjunction with the New York statute of limitations to bar recovery for libels initially published here and distributed later either here or in other states or countries.

Miss Mattox was injured in Norfolk, Virginia, not in the State of New York, where no one knew her. We are bringing one action for an injury to the plaintiff which occurred in Virginia and we cannot believe that one state can force us to apply the law of their state where, admittedly, our client has suffered no damage.

Quoting again from the case of *Hartman* v. *Time, Incorporated (supra)*:

> "Under Illinois, Pennsylvania and Alabama law, a single issue of a newspaper constitutes one tort, but this does not mean that the Pennsylvania courts will not refer the respective foreign publications to the appropriate foreign law, but indeed, the contrary is true."

O'Reilly v. *Curtis Publishing Co.*, 31 F. Supp. 364 (1940), was a case in which the plaintiff was a citizen of Rhode Island and brought an action against the Curtis Publishing Company, a Delaware corporation, in the Massachusetts court. The Massachusetts law provides that punitive or exemplary damages are not recoverable. The defendant contended that the Massachusetts law controlled. The court held that the court would apply the law of the state in which the cause of action arose. The court further said:

> "The defendant's liability for the libel published in each state is governed by the laws of that particular state."

The rule is well characterized in 48 Col. L. Rev. 923, at 935, where it is said that the single publication rule has been evolved as a practical means of protecting the forum against the multiplicity of suits and indefinite tolling of the statute of limitations which results from the application of the early common law rule of multiple publication to modern methods of mass distribution.

Analysis of the Virginia Law

The trial judge, in connection with the hearing of the depositions, advised counsel that there was a conflict of laws involved, although this is not in the record, and proceeded on with the trial of the case, and there was never any stipu-

lation that this case would be tried under the New York law, nor does the record so indicate.

In the case of *Snyder* v. *Fatherly* (1932), 158 Va. 335, 163 S. E. 368, the Supreme Court of Appeals of Virginia, in speaking of damages, said:

> "There is plenty of evidence in the case in judgment showing the injury to the plaintiff's feelings, her mental suffering, injury to her character and reputation, *reflected by the ignominy in which her former associates held her on account of the defamation.* (Italics ours.)

It will be noted that in Virginia, an element of the damage to be considered by the jury is her mental suffering * * * reflected by the ignominy in which her former associates held her on account of the defamation. And the court expressly approved the following charge:

> "The Court instructs the jury that in determining the amount of damages to which the plaintiff may be entitled, if you believe she is entitled to recover, you shall take into consideration all the facts and circumstances of the case as disclosed by the evidence, the nature and character of the charges, the language in which those charges were expressed, the occasion on which they were published, the extent of their circulation, *the probable effect upon those to whose attention they came, and the probable effect upon the plaintiff's personal feelings and her standing in the community in which she lives;* and if under the instructions herein she is entitled to recover, you shall award her such sum by way of damages as will fairly and adequately compensate her:
>
> 1. For the insult to her, the injury to her feelings, including any pain, mortification and mental suffering inflicted upon her; and
>
> 2. For any damage to her reputation as an honest woman and citizen." (Italics ours.)

In *News Leader Company* v. *Kocen* (1939), 3 S. E. 2d 385, the court recognized as an element of damage, that the Plaintiff had been "mortified by people telephoning her" and by the libel being mentioned to her children.

In *James* v. *Powell* (1930), 154 Va. 96, 152 S. E. 539, the court approved the following instruction:

> "The court further instructs the jury that in determining the amount of damages to which the plaintiff may be entitled, you shall take into consideration all the facts and circumstances of the case as disclosed by the evidence, the nature and character of the charges, the language in which they were expressed, and its tendency, the occasion on which they were published, the extent of their circulation, *the probable effect upon those to whose attention they came, and their natural and probable effect upon the plaintiff's personal feelings, and his standing in the community in which he lives;* and if under the other instructions herein, he is entitled to recover, you shall award such sum by way of damages as will fairly and adequately compensate him for the insult to him, including any pain and mortification and mental suffering inflicted upon him, and for any injury to his reputation as a man and citizen." (Italics ours.)

The court reaffirmed an earlier decision in *Ramsey* v. *Harrison,* 119 Va. 682, 89 S. E. 977.

Conclusion

There are no novel questions presented to the court for the granting of the writ of certiorari, and this case has been decided upon precedents that have been well established and sound in reason and justice.

The "single publication" rule has no application to the facts involved in this action upon the authorities cited. The decisions of the Virginia courts are applicable without dissent.

It is respectfully submitted that the granting of a writ of certiorari is not warranted in this case and the Circuit Court of Appeals in its opinion, properly said:

> "If a newspaper chooses to embellish accounts of crime with false slurs upon the good name of blameless persons, there is no conceivable reason why it should not make full redress."

Respectfully submitted,

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